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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

## No. 459

GLADYS L. BINDLEY,
*Petitioner,*

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
a Corporation,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

## RESPONDENT'S BRIEF IN OPPOSITION

HENRY G. EAGER
CHARLES B. BLACKMAR,
906 Commerce Building
Kansas City 6, Missouri
*Counsel for Respondent*

SAMUEL F. FORTUNATO
One Madison Avenue
New York 10, New York

BLACKMAR, SWANSON, MIDGLEY,
JONES AND EAGER
906 Commerce Building
Kansas City 6, Missouri
*Of Counsel*

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-2030

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### STATEMENT

The petitioner has not clearly indicated the critical time sequence of this litigation. After the action was remanded by the Missouri Supreme Court on September 30, 1948 (See *Bindley* v. *Metropolitan Life Insurance Company*, Mo. Sup., 213 S.W.2d 387), the petitioner took no action at all until January 21, 1959, when she filed her motion to set aside the May 21, 1956, involuntary dismissal. This order reads (Tr. 34, 47):

"Now on this day in each of the following numbered and entitled causes, the parties hereto having been duly notified failed to appear.

"It is therefore ordered and adjudged by the court that said causes be and the same are hereby dismissed without prejudice and that said defendants recover of plaintiffs their costs and that execution issue therefor.

* * * *

519,292 Gladys L. Bindley v. Metropolitan Life Ins. Company

* * * *"

The order was entered after a "full ten days' notice" by newspaper publication (Tr. 70) which included at least six advance listings (Tr. 60, 63) of the threatened dismissal. These publications all appeared in the Daily Record, a well known local periodical, which the petitioner's counsel admittedly read (Pet. 13, Tr. 36-7). It is thus apparent that the dismissal was not entirely "without notice" as the petitioner now states (Pet. 2) and, in view of the recital "without prejudice", was not "to be accorded finality" as she also now contends (Pet. 2). In the latter connection, Sec. 516.230, Revised Statutes of Missouri, 1949, provides that suit could have been refiled up to May 22, 1957, without regard to any other statutes of limitation. This statute says in part:

"If any action shall have been commenced within the times respectively prescribed in sections 516.010 to 516.370, and the plaintiff therein suffer a nonsuit * * * such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered * * *."

Although the petitioner attacks the newspaper publications as incorrect and misleading (Pet. 2), it is undeniably true that the right caption and docket number were always used.

## ARGUMENT

We do not understand in what manner the present decision offends Mrs. Bindley's alleged property rights under the 14th Amendment. Her substantive claim is for the wrongful death of her former husband, which action is derived from local law and not from a federal source as is required by 28 U.S.C., Sec. 1257(3). We similarly perceive no "special and important" reasons of public concern which urge the exercise of this Court's discretionary intervention under Supreme Court Rule 19(1).

Our question is whether state courts may properly police their crowded trial dockets by the dismissal of inactive cases for failure to prosecute. It was for this reason that during 1956 the Circuit Court at Kansas City dismissed some 6,000 old cases, including the present one, via regularly published advance notice in the Daily Record. The instant Missouri Supreme Court decision holds that:

1. The petitioner's inactivity for almost eight years fully justified the trial court's use of its inherent dismissal power (Pet. 25, 27-8), and

2. The six-day advance notice by publication was reasonably calculated to advise Mrs. Bindley or her attorney of the proposed trial setting or a dismissal upon her default (Pet. 28-9).

3. In any event, the dismissal order was only interlocutory because it was expressly made "without prejudice" to a refiling within one year under Sec. 516.230, R.S.Mo. 1949, and thus could not deny due process or equal protection to the petitioner (Pet. 29), and

4. The recurring, unexplained inaction by the petitioner between the May 21, 1956, dismissal and her January 21, 1959, motion to set aside the dismissal is *per se* justification for an involuntary nonsuit under the local law (Pet. 30).

The state court carefully considered the constitutional issue and thereafter summarized its holding, saying (Pet. 30; 335 S.W.2d 70):

> "Thus it is clear that the order of dismissal without prejudice made on May 21, 1956, deprived plaintiff of no right inuring to her under the due process clause of the 14th Amendment. It is also clear that the only order which finally deprived her of the right to further prosecute the cause was made after full hearing on plaintiff's motion to set aside that order, at which hearing the evidence conclusively showed that plaintiff had continuingly failed to prosecute the cause with diligence from the date of remand in 1948 until the order made on February 23, 1959, refusing to set aside the dismissal made on May 21, 1956."

The interpretation of Kansas City Circuit Court Rule 14 (Pet. 3-4) governing jury trials and the power of the Missouri courts to *non pros* old cases (Pet. 4-8) are both local problems which obviously raise no "federal questions of substance" under Supreme Court Rule 19(1)(a). However, it is nevertheless well recognized in Missouri and elsewhere that litigants are required to exercise diligence in prosecuting their causes and, thus, the petitioner may not permit this action to stagnate for almost 11 years and then suddenly complain of the three-year old interlocutory order of dismissal. To this effect see *City of Jefferson* v. *Capital City Oil Company*, Mo.App., 286 S.W.2d 65, 68; *St. Ferdinand Sewer District of St. Louis County* v. *Turner*, Mo.App., 208 S.W.2d 85, 87; *Wiles-Chipman Lumber Com-*

pany v. *Pieper*, Mo.App., 176 S.W.2d 50, 52; *Crispin* v. *St. Louis Public Service Company*, Mo.Sup., 237 S.W.2d 153, 155; *Salle* v. *Holland Furnace Company*, Mo.Sup., 337 S.W.2d 87, 90; 27 C.J.S., *Dismissal and Nonsuit*, Sec. 65(1), p. 430.

In a leading Missouri case, *Guhman* v. *Grothe*, Mo.Sup., 142 S.W.2d 1, it was aptly held, l.c. 2:

> "This review involves a dismissal for failure to prosecute with due diligence, and may be sustained on facts not within the cited statutory provisions. 'The power of courts to dismiss a case because of failure to prosecute with due diligence is said to be inherent and independent of any statute or rule of court.'"

The first opinion in this same case, *Bindley* v. *Metropolitan Life Insurance Company*, Mo.Sup., 213 S.W.2d 387, ruled this specific point at l.c. 391:

> "We do not question the inherent power of the court to dismiss a cause, on its own motion, for want of prosecution * * *."

The failure of a party to appear at trial affords an adequate reason for peremptory dismissal. *Hannibal* v. *St. Louis Public Service Company*, Mo.App., 200 S.W.2d 568; 27 C.J.S., *Dismissal and Nonsuit*, Sec. 65(1), p. 429. At all times before trial an attorney "is charged with the duty and presumed to know what is going on in his case * * *." *In re Jackson's Will*, Mo.App., 291 S.W.2d 214, 225. Counsel "'must take notice of all proceedings until final judgment is rendered * * *'". *Cohen* v. *Ennis*, Mo.Sup., 318 S.W.2d 310, 316, and knowledge of an attorney is notice to his client. *Priddy* v. *MacKenzie*, Mo.Sup., 103 S.W. 968, 971.

A dismissal with prejudice on similar facts was recently approved in *Doughty* v. *Terminal Railroad Association of St.*

*Louis*, Mo.Sup., 291 S.W.2d 119. After only one newspaper publication the case was called for trial, continued for several days and then dismissed. In holding that the trial court did not thereby abuse its discretion, the Missouri court said, l.c. 121:

> "With legal notice of the setting * * * plaintiff could certainly not have complained of a dismissal on that day upon his non-appearance; we hold that he was legally charged with notice of what then occurred, including the 'passing' of the case until Thursday, April 1 * * *. It would seem wholly impracticable to give notices, personal or by publication, of all the day-to-day delays and changes in the handling of a voluminous weekly trial docket, and we do not think that either the court rules or the requirements of due process require such. Parties and counsel who are in fact awaiting trial must certainly follow the docket day by day, if indeed not more frequently, and beginning with the original trial setting."

The Missouri authorities are in full accord with the federal *non pros* dismissal practice, either with or without notice and motion, see Federal Rule 41(b); *Hicks* v. *Bekins Moving & Storage Co.*, 9 Cir., 115 F.2d 406, 408-9; *Shotkin* v. *Westinghouse Electric & Mfg. Co.*, 10 Cir., 169 F.2d 825, 826; *Russell* v. *Cunningham*, 9 Cir., 233 F.2d 806, 810; *Sweeney* v. *Anderson*, 10 Cir., 129 F.2d 756, 758; *Agronofsky* v. *Pennsylvania Greyhound Lines*, 3 Cir., 248 F.2d 829, 831; *Salmon* v. *City of Stuart*, 5 Cir., 194 F.2d 1004; *Cage* v. *Cage*, 5 Cir., 74 F.2d 377, 378; *Barger* v. *Baltimore & Ohio Railroad Co.*, App. D.C., 130 F.2d 401, 402; *Zielinski* v. *United States*, 2 Cir., 120 F.2d 792, 793; 5 Moore's *Federal Practice*, Sec. 41.11, pp. 1035-7.

The dismissal was not a judgment on the merits in Missouri, *Fenton* v. *Thompson*, Mo.Sup., 176 S.W.2d 456, 460, the *Guhman* case, *supra*, 142 S.W.2d 2, the *Bradley*

case, *supra*, 213 S.W.2d 391, the *Crispin* case, *supra*, 237 S.W.2d 155, and thus the petitioner was actually harmed, not by the May 21, 1956 dismissal, but by her own lethargy.

## CONCLUSION

The Supreme Court of Missouri having fully considered and determined this cause upon well-established principles of local law which in no way conflict with the decisions or announced policy of this Court, we pray that the instant petition for writ of certiorari be promptly denied.

Respectfully submitted,

HENRY G. EAGER
CHARLES B. BLACKMAR
906 Commerce Building
Kansas City 6, Missouri
*Counsel for Respondent*

SAMUEL F. FORTUNATO
One Madison Avenue
New York 10, New York
BLACKMAR, SWANSON, MIDGLEY,
JONES AND EAGER
906 Commerce Building
Kansas City 6, Missouri
*Of Counsel*